Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

ROBERT A. BECK, II,

Petitioner,

vs.

ROBERT M. PRUPIS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employee who is terminated for both blowing the whistle on and refusing to participate in a pattern of predicate acts of racketeering forbidden by the Racketeering and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, may assert a civil RICO conspiracy claim, where he has been injured by an overt act in furtherance of the RICO conspiracy, which overt act is not, itself, a predicate act of racketeering (a question as to which the circuit courts of appeal are in direct conflict).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the District Court and Court of Appeals were:

Plaintiff Robert A. Beck, II, Petitioner here

Defendant Ronald M. Prupis, Respondent here

Defendant Leonard Bellezza, Respondent here

Defendant Ernest J. Sabato, Respondent here

Defendant William Paulus, Jr., Respondent here

Defendant Harry Olstein, Respondent here

Defendant Frederick C. Mezey, Respondent here

Defendant Joseph S. Littenberg, Respondent here

Defendant Byron L. Sparber, not a party here

Defendant Neil Prupis, not a party here

Defendant William Lipkind, not a party here

Defendant Firemark Consultants, Inc., not a party here

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
I. The Underlying Facts	2
II. Beck's Claim	3
III. The Decisions Below	4
REASONS FOR GRANTING THE WRIT	6
There Is A Sharp Split Among The Circuits On The Important Federal Issue Presented By This Petition	6
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Amaker v. Coombe, ___ F.Supp.2d ___, 1998 WL 637177 (S.D.N.Y. Sept. 16, 1998) 13

Beck v. Prupis, 162 F.3d 1090 (11th Cir. 1998) ..... *passim*

Bowman v. Western Auto Supply Co., 985 F.2d 383 (8th Cir. 1992), *cert. denied*, 508 U.S. 957 (1993) 7, 8, 15

Cullom v. Hibernia National Bank, 859 F.2d 1211 (5th Cir. 1988) 5, 6, 14

Flinders v. Datasec Corp., 742 F.Supp. 929 (E.D.Va. 1990) 9

Gagan v. Am. Cablevision, Inc., 77 F.3d 951 (7th Cir. 1996) 8, 11

Hecht v. Commerce Clearing House, Inc., 897 F.2d 21 (2d Cir. 1990) 8, 15

Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 9, 13, 14

In Re: American Honda Motor Co., Inc. Dealership Relations Litig., 941 F.Supp. 528 (D.Md. 1996) 9

Kaplan v. Reed, 28 F.Supp.2d 1191 (D.Col. 1998) 13

Khurana v. Innovative Health Care Systems, Inc., 130 F.3d 143 (5th Cir. 1997), *cert. granted, judgment vacated as moot*, ___ U.S. ___, 119 S.Ct. 442 (1998) ..... *passim*

Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 7 F.Supp.2d 277 (S.D.N.Y. 1998) 13

Miranda v. Ponce Federal Bank, 948 F.2d 41 (1st Cir. 1991) 8, 15

Morast v. Lance, 807 F.2d 926 (11th Cir. 1987) 4

TABLE OF AUTHORITIES – Continued

Page

O'Malley v. O'Neill, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) 4, 5, 6

Reddy v. Litton Indus., Inc., 912 F.2d 291 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991) 6, 7, 8

Rehkop v. Berwick Healthcare Corp., 95 F.3d 285 (3d Cir. 1996) 8, 16

Sadighi v. Daghighfekr, ___ F.Supp.2d ___, 1999 WL 38430 (D.S.C. Jan. 22, 1999) 9

Salinas v. United States, 552 U.S. 52 (1997) 5, 12, 13

Schiffels v. Kemper Fin. Servs., Inc., 978 F.2d 344 (7th Cir. 1992) 8, 10, 11, 13, 16

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985) 9, 11, 15

Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162 (3d Cir. 1989) 8, 11, 13, 16

Southern Intermodal Logistics, Inc. v. D.J. Powers Co., 10 F.Supp.2d 1337 (S.D.Ga. 1998) 13

United States v. Munsingwear, Inc., 340 U.S. 36 (1950) 7

United States v. Neapolitan, 791 F.2d 489 (7th Cir. 1986) 11

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 10

Willis v. Lipton, 947 F.2d 998 (1st Cir. 1991) 5

STATUTES AND RULES

18 U.S.C. § 1341 4

18 U.S.C. § 1343 4

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 1961 7

18 U.S.C. § 1962(d) 1, 3, 4, 7, 10, 12

18 U.S.C. § 1964(c) 1, 4, 7, 10, 11

28 U.S.C. § 1254(1) 1

MISC. SOURCES

Theresa E. Loscalzo and Stacy J. Levitan, *RICO Conspiracy: Whistleblowers – Coming in Through the Back Door*, 10 LABOR LAWYER 679 (1994) 9, 10

W.B. Markovits, *Expanding RICO Civil Liability for Lawyers and Other "Outsiders": Perspectives of a Plaintiff's Lawyer*, 45 FED.LAW. 35 (1998) 13

Keith S. Marks, Comment, *RICO Law – Wrongful Discharge and RICO Conspiracy Standing: The Holmes v. Securities Investor Protection Corp. Direct-Injury Test Resolves the Standing Issue*, 16 W.N.E. LAW REV. 365 (1994) 14

Brian M. Molinari, *Conspiracy-Theory: The RICO Predicate Act Requirement for Wrongful Discharge Cases Brought Under 18 U.S.C. § 1962(d)*, 31 SUFFOLK U.L. REV. 481 (1997) 9

Title IX of the Organized Crime Control Act of 1970, Pub.L. No. 91-452 § 904(a), 84 Stat. 947 (1970) 11, 14

PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert A. Beck, II ("Beck"), respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 15, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 162 F.3d 1090, and is reprinted in the appendix hereto, p. 1.

The opinion of the United States District Court for the Southern District of Florida (Roettger, D.J.) is unreported, but is reprinted in the appendix hereto, p. 23.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on December 15, 1998. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions at issue in this case are 18 U.S.C. §§ 1962(d) and 1964(c), which are reprinted in the appendix hereto, p. 47.

STATEMENT OF THE CASE

I. The Underlying Facts.[1]

This case arises out of the relationship between Beck, the plaintiff, and members of the board of directors of the Southeastern Insurance Group, Inc. ("SIG"). SIG was a holding company founded in 1983. It owned three subsidiaries, all of which were in the business of writing surety bonds for construction contractors. The defendants in this case were all directors of SIG at one time.

In 1987, some of the directors of SIG (including the defendants) began engaging in improper activity. For instance, they set up an entity called Construction Performance Corporation, which extracted substantial "fees" from otherwise non-creditworthy contractors in order to qualify them for SIG surety bonds, in violation of insurance regulations. The directors reneged on promises to indemnify certain contractors, and diverted corporate funds to their personal use. Finally, these directors knowingly classified certain SIG liabilities as assets on SIG's financial statements, causing the statements drastically to overestimate the corporation's value. These false financial statements were then given to regulators, shareholders, and creditors.

This misconduct eventually led to a lawsuit by the Florida Department of Insurance and a shareholders' derivative suit against SIG's officers and directors, filed in the United States District Court for the District of New

[1] The underlying facts are taken directly from the relevant portions of the Eleventh Circuit's December 15, 1998 opinion in this case. App. 2-4.

Jersey. In January 1990, as a result of the illegal activities of certain SIG directors and the consequent lawsuits, SIG filed for bankruptcy in the Southern District of Florida.

Meanwhile, in August 1983, SIG had hired Beck to serve as president and as a member of the board of directors. His employment contract, as revised in 1986, did not expire until 1991. The contract specified the grounds on which Beck's employment could justifiably be terminated, and stated that termination for any other reason would result in SIG being required to repurchase Beck's substantial stock holdings in the company. The repurchase price would be the fair market value of the stock as determined by an investment bank.

For most of his tenure, Beck was unaware of the illegal activities of the other SIG officers and directors. When he became aware of this misconduct in early 1988, he attempted to correct them internally and informed insurance regulators about improprieties in SIG's financial statements. The other directors, afraid that Beck might expose their misdeeds, arranged for a consulting firm to write a report criticizing Beck's performance, thus providing the directors an excuse to terminate Beck's employment without having to repurchase Beck's stock. In May 1988, Beck was fired for both his refusal to participate in the defendants' illegal conduct and his blowing the whistle on that conduct.

II. Beck's Claim.

Beck alleged and presented evidence that the defendant directors conspired, in violation of § 1962(d), to commit a pattern of racketeering activity, specifically mail

fraud, in violation of 18 U.S.C. § 1341, and wire fraud, in violation of 18 U.S.C. § 1343. Beck had been terminated for his refusal to participate in and his blowing the whistle on the defendant directors' RICO conspiracy. Beck's termination was an overt act in furtherance of the RICO conspiracy and, thus, he was injured by reason of a violation of 18 U.S.C. § 1962(d), giving him a private right of action pursuant to 18 U.S.C. § 1964(c). This is the only claim that is relevant to this petition.

This and Beck's other claims were originally brought as cross-claims while Beck was a defendant in the shareholders' derivative suit against SIG and its directors in the United States District Court for the District of New Jersey. Beck's cross-claims were subsequently severed and transferred to the Southern District of Florida. The shareholders' derivative suit was ultimately dismissed for procedural reasons.

III. The Decisions Below.

The United States District Court for the Southern District of Florida granted the defendant directors' Motion for Summary Judgment, holding that Beck lacked standing to assert a claim for a RICO conspiracy for either being "discharged in retaliation for reporting a RICO mail fraud scheme, or for refusing to participate in the scheme," citing the Eleventh Circuit cases of *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987) and *O'Malley v.*

O'Neill, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). App. 42.[2]

While noting that Beck had set forth evidence of illegal conduct, the Eleventh Circuit held as follows:

> This case hinges on the following question: Must a plaintiff bringing a civil RICO conspiracy claim prove that the overt act (in furtherance of the conspiracy) by which he was injured was an "act of racketeering"? We answer this question in the affirmative, and therefore affirm the district court's grant of summary judgment.

Beck v. Prupis, 162 F.3d 1090, 1093 (11th Cir. 1998) (App. 2). In so holding, the circuit court expressly noted a conflict between the circuits on this issue, pointing to decisions from the Seventh, Third and Fifth Circuits that disagreed with its holding, and cases from the Eighth, Ninth and Second that agreed. *Id.* at 1098-99 (App. 14-16). The Eleventh Circuit also declined to apply this Court's recent opinion, *Salinas v. United States*, 522 U.S. 52 (1997), which holds that "criminal RICO conspiracy has no overt act requirement," to a civil RICO case. *Id.* at 1099 n.18 (App. 16-17).

This petition followed.

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[2] The district court also cited *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211 (5th Cir. 1988), which the Fifth Circuit has since limited to its facts (*see Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 152-53 (5th Cir. 1997)), and *Willis v. Lipton*, 947 F.2d 998 (1st Cir. 1991), in granting the Motion for Summary Judgment on this claim. App. 42.

REASONS FOR GRANTING THE WRIT

THERE IS A SHARP SPLIT AMONG THE CIRCUITS ON THE IMPORTANT FEDERAL ISSUE PRESENTED BY THIS PETITION.

This Petition for a Writ of Certiorari should be granted to review the Eleventh Circuit's holding that " . . . a plaintiff bringing a civil RICO conspiracy claim [must] prove that the overt act (in furtherance of the conspiracy) by which he was injured was an 'act of racketeering' " and that " . . . a terminated whistle-blower . . . has not suffered an injury that was proximately caused by the defendants' *racketeering* activities." *Beck v. Prupis*, 162 F.3d at 1093 and 1098 (App. 2 and 14-15). This is an important, recurring question of federal law. In the eight years since Justice White dissented from the denial of certiorari to resolve a split among the circuits (which, at the time, was two-to-one), *Reddy v. Litton Indus., Inc.*, 502 U.S. 921 (1991), the division in the circuits has widened dramatically to, currently, a five-to-three split.

Prior to this case, the most recent entry in this dispute between the circuits came in December 1997 from the Fifth Circuit, in *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143 (5th Cir. 1997),[3] *cert. granted, judgment vacated as moot*, ___ U.S. ___, 119 S.Ct. 442 (1998).[4] In *Khurana*, the Fifth Circuit joined the circuits that have held that "civil RICO standing for a § 1962(d) violation may be premised on injury proximately caused by overt acts in furtherance of the conspiracy that are *not* § 1961(1) predicate acts." *Id.* at 152.

> Like the Seventh Circuit, we refuse to place a limitation on RICO standing that RICO itself does not impose. Since § 1962(d) does not require that a predicate racketeering act actually be committed, it follows that the act causing a § 1964(c) claimant's injury need not be a predicate act of racketeering. A person injured by an overt act in furtherance of a RICO conspiracy has been injured by reason of the conspiracy, and thus has § 1964(c) standing. To interpret otherwise would ignore § 1964(c)'s provision for civil liability for, *inter alia*, a violation of § 1962(d) that proximately injures a person's property or business.

Id. at 153 (citations omitted). Prior to so holding, *Khurana* first discussed the "division of circuit authority" on this question, citing *Reddy v. Litton Indus., Inc.*, 502 U.S. 921 (1991) (White, J., dissenting from denial of *certiorari* and noting circuit split), and *Bowman v. Western Auto Supply Co.*, 985 F.2d 383 (8th Cir.) (collecting cases), *cert. denied*, 508 U.S. 957 (1993). *Id.* at 152.

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[3] *Khurana* limited a prior holding from the Fifth Circuit, *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211 (5th Cir. 1988), to its facts. *Khurana*, 130 F.3d at 152-53. Prior to that time, courts had cited *Cullom* as indicating that the Fifth Circuit was actually a member of the majority that held that a terminated whistleblower could not assert a RICO conspiracy claim. *See, e.g., O'Malley*, 887 F.2d at 1562-63; App. 42 (district court in the present case, whose decision preceded *Khurana*, cites *Cullom* as support for its holding on this issue).

[4] After the *Khurana* petition for a writ for certiorari was filed, the respondent indicated that he would withdraw his complaint, rather than opposing the petition. Thus, this Court, on the petitioners' application, granted certiorari, but vacated the judgment as moot, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

There can be no doubt as to the sharp division of circuits. In fact, in the present case, the Eleventh Circuit expressly noted this direct conflict between the circuits. *Beck*, 162 F.3d at 1098 and n.15, 16 and 17. The Third and Seventh Circuits have held that a person terminated for blowing the whistle on and/or refusing to participate in a pattern of racketeering has been injured by an overt act in furtherance of the conspiracy and, as such, has been injured as a result of the RICO conspiracy, and may, accordingly, assert a § 1964(c) civil RICO claim. *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989); *see also Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 290 (3d Cir. 1996) (discussing split of circuits and following *Shearin*); *Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 958-59 (7th Cir. 1996) (discussing split of circuits and following *Schiffels*). The First, Second, Eighth and Ninth Circuits have taken a diametrically opposite view. *See Miranda v. Ponce Federal Bank*, 948 F.2d 41 (1st Cir. 1991); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383 (8th Cir. 1992); and *Reddy v. Litton Indus., Inc.*, 912 F.2d 291 (9th Cir. 1990),[5] *cert. denied*, 502 U.S. 921 (1991). With

[5] While the Ninth Circuit made clear that it preferred the holding of *Hecht* to *Shearin*, its one opinion on the issue, *Reddy*, distinguishes *Shearin* on its facts, rather than expressly rejecting it. *Reddy*, 912 F.2d at 295 ("Because the hiring and discharge of the plaintiff in *Shearin* were acts that were 'essential' to the alleged conspiracy, the *Shearin* case is distinguishable on its facts from this appeal. If, however, there is any doctrinal inconsistency between *Hecht* and *Shearin*, we prefer the rule of *Hecht*."). Later, the Third Circuit made clear that *Shearin*'s holding was not to be so limited. *Rehkop*, 95 F.3d at 290 n.7

the two most recent decisions, *Khurana* and *Beck*, each joining one of the two camps, the current scorecard of circuits is five-to-three, with the narrow majority rejecting the terminated employee's ability to assert a civil RICO conspiracy claim.[6]

The commentators similarly are split in their analysis. *See, e.g.*, Brian M. Molinari, *Conspiracy Theory: The RICO Predicate Act Requirement for Wrongful Discharge Cases Brought Under 18 U.S.C. § 1962(d)*, 31 SUFFOLK U.L. REV. 481 (1997) (discussing split of authority and concluding that "the Third and Seventh Circuits . . . correctly apply *Sedima* and *Holmes* principles without losing sight of the plain statutory language of civil RICO."); Theresa

("Although Shearin's firing was essential to the conspiracy in her case, we did not hold that all overt acts that establish a conspiracy must be 'essential' to the existence of the conspiracy . . . Rather, we required only that an action must be 'in furtherance' of the conspiracy to be considered part of the RICO violation. Thus, there is no requirement that an action be essential to the conspiracy to be 'in furtherance' thereof.").

[6] In the Fourth Circuit, which has not yet decided the issue, there is a split among the district courts. *Compare Sadighi v. Daghighfekr*, ___ F.Supp.2d ___, 1999 WL 38430 (D.S.C. Jan. 22, 1999) (noting split of circuits, and stating that "the minority view appears persuasive," but holding that person terminated in furtherance of conspiracy had not been injured by a predicate act and, thus, could not state a civil claim for a § 1962(d) violation), *with Flinders v. Datasec Corp.*, 742 F.Supp. 929, 933-34 (E.D.Va. 1990) (noting split of circuits, reasoning that "the Third Circuit's approach is sounder and it follows more closely the plain meaning of the statute," and holding that "RICO conspiracy standing does not require an injury caused by a predicate offense"); *see also In re American Honda Motor Co. Dealership Relations Litig.*, 941 F.Supp. 528, 550 (D.Md. 1996) (noting that the "circuits are split").

E. Loscalzo and Stacy J. Levitan, *RICO Conspiracy: Whistleblowers – Coming in Through the Back Door*, 10 LABOR LAWYER 679 (1994) (noting that "[t]he United States Supreme Court has recently declined to address the conflict between circuits," and concluding that "the courts in *Shearin* and *Schiffels* have gone too far by allowing recovery under the auspices of RICO for non-RICO caused injuries.").

The rationales for allowing a person to assert a civil RICO conspiracy claim for an injury-causing overt act that is not also a predicate act of racketeering are well-established. 18 U.S.C. § 1964(c) allows suits by anyone "injured . . . by reason of a violation of section 1962." 18 U.S.C. § 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." Absent an ambiguity or conflict with a statute's legislative purpose, the plain meaning of the statute must control. *Khurana*, 130 F.3d at 153 (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)).

> A person directly injured by an overt act in furtherance of a RICO conspiracy has been injured "by reason of" the conspiracy. Since a conspiracy to violate RICO's substantive provisions is itself a violation of RICO, a person injured "by reason of" the conspiracy has been injured "by reason of" the RICO violation. That is all that § 1964(c) requires for standing to bring a civil RICO action.

Schiffels, 978 F.2d at 349 (citations omitted). Furthermore, "[i]nterpreting § 1962(d) in this manner is consistent with common law concepts of conspiracy. A conspiracy to

violate RICO should not require anything beyond that required for a conspiracy to violate any other federal crime." *Gagan*, 77 F.3d at 959 (quoting *United States v. Neapolitan*, 791 F.2d 489, 497 (7th Cir. 1986)).

These courts refuse to place "a limitation on RICO standing that RICO itself does not impose." *Khurana*, 130 F.3d at 153 (citing *Schiffels*, 978 F.2d at 346). A RICO conspiracy does not require the commission of a predicate racketeering act, at all. *Shearin*, 885 F.2d at 1169. Thus, "it follows that the act causing plaintiff's injury need not be a predicate act of racketeering." *Id.*; *Schiffels*, 978 F.2d at 349; *Khurana*, 130 F.3d at 153. Otherwise, 1962(d) becomes superfluous to 1962(c) in the civil context. *Id.* "Buttressing this position is the Supreme Court's and Congress's direction that 'RICO is to be read broadly' and 'liberally construed to effectuate its remedial purpose.' " *Khurana*, 130 F.3d at 153 (quoting *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-98 (1985), and Title IX of the Organized Crime Control Act of 1970, Pub.L. No. 91-452, § 904(a), 84 Stat. 947 (1970)). "A reading of §§ 1962(d) and 1964(c) that limits standing to sue for RICO conspiracy only to those injured by predicate acts – a limitation that does not appear on the face of those sections and is inconsistent with a natural reading of those sections – is inconsistent with this dictate." *Schiffels*, 978 F.2d at 350.

> Congress could have written RICO to state that only those injured by reason of predicate acts committed as part of a RICO violation could sue. It did not, and for courts to read § 1964(c)

> as if that is what Congress wrote would be tantamount to rewriting the statute.

Id.

Recently, this Court reiterated some of the underpinnings of these cases in *Salinas v. United States*, 522 U.S. 52 (1997), in which this Court established that:

> There is no requirement of some overt act or specific act in the statute before us [18 U.S.C. § 1962(d)], unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an "act to effect the object of the conspiracy." § 371. The RICO conspiracy provision, then, is even more comprehensive than the general conspiracy offense in § 371.
>
> In interpreting the provisions of § 1962(d), we adhere to a general rule: When Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition. The relevant statutory phrase in § 1962(d) is "to conspire." We presume Congress intended to use the term in its conventional sense . . . .

Id., 522 U.S. at ___, 118 S.Ct. at 476-77 (citations omitted).

Salinas, thus, lends support to the rationales discussed above for holding that a civil RICO conspiracy claim *can* be made where the claimant has been injured by an overt act that is not a predicate act of racketeering.[7]

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[7] "While the Supreme Court has as yet declined to resolve the split among the circuits regarding RICO standing under § 1962(d), the *Salinas* decision supports the more liberal reading

The Eleventh Circuit, however, limited *Salinas* to only criminal RICO issues. *Beck*, 162 F.3d at 1099 n.18 (App. 16-17).[8]

Further, as noted in *Schiffels*, the proximate cause/direct injury requirement provided by *Holmes v. Securities Investor Protection Corp.* does place a limit " . . . under *Shearin*'s approach to standing," *Schiffels*, 978 F.2d at 350, appropriately confining the exercise of RICO jurisdiction to its heartland. Where

> . . . an employee is fired to prevent the employer from causing the conspiracy to unravel by disclosing the scheme[,] . . . [u]nlike in *Holmes*, the employee has been directly injured by the defendant's RICO violation. Just as important, the act causing the injury has been committed to further the conspiracy and is directly related to the conspiracy's goals. This brings the injured employee well within the zone of interests RICO is meant to protect.

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allowing standing to anyone injured by overt acts." W.B. Markovits, *Expanding RICO Civil Liability for Lawyers and Other "Outsiders": Perspectives of a Plaintiff's Lawyer*, 45 FED.LAW. 35, 38-39 (1998).

[8] This limitation, itself, conflicts with other decisions. *See, e.g., Kaplan v. Reed*, 28 F.Supp.2d 1191, 1197 (D.Col. 1998) (discussing *Salinas* in civil RICO case); *Amaker v. Coombe*, ___ F.Supp.2d ___, 1998 WL 637177 (S.D.N.Y. Sept. 16, 1998) (same); *Southern Intermodal Logistics, Inc. v. D.J. Powers Co.*, 10 F.Supp.2d 1337, 1361 n.45 (S.D.Ga. 1998) ("this Court will apply *Salinas* to this [civil] action."); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 7 F.Supp.2d 277, 288 n.6 (S.D.N.Y. 1998) (citing *Salinas* in civil RICO case).

Id. at 351; *see also* Keith S. Marks, Comment, *RICO Law – Wrongful Discharge and RICO Conspiracy Standing: The Holmes v. Securities Investor Protection Corp. Direct-Injury Test Resolves the Standing Issue*, 16 W.N.E. LAW REV. 365 (1994) (concluding that, under *Holmes*, " . . . predicate acts were not intended to serve as an independent limiting factor for RICO standing based upon a RICO conspiracy violation."). In addition,

> . . . the policy reasons for allowing whistle blowers, as opposed to non-participants, to sue under RICO are more persuasive because in addition to exposing the illegal scheme to the public by bringing a private suit, the whistle blower often times exposes the illegal scheme to the authorities and cooperates with the authorities, thus "strengthening the legal tools in the evidence-gathering process."

Cullom, 859 F.2d at 1217 (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, 1970 U.S. Code Cong. & Admin. News, 1073).

In this case, however, the Eleventh Circuit, after noting the "substantial debate in the federal courts of appeals regarding whether the overt act necessary for a RICO conspiracy must be an act of racketeering as defined in section 1961(1)," joined in the reasoning utilized by courts that reject a terminated employee's RICO conspiracy claim. *Beck*, 162 F.3d at 1098-99 (App. 14-17). The opinion states that *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), which holds that "a plaintiff's injuries must have been proximately caused by acts

of racketeering" applies "equally well to RICO's conspiracy provisions." *Beck*, 162 F.3d at 1098 (App. 15). Similarly, the Eleventh Circuit stated that "RICO was enacted with an express target – racketeering activity – and only those injuries that are proximately caused by racketeering activity should be actionable under the statute." *Id.* at 1098-99 (App. 15-16) (citing *Hecht*, 897 F.2d at 25, and H.R.Rep. No. 91-1549 (1970)).[9] While noting that suits such as Beck's "could perhaps have a deterrent effect on racketeering," the court stated that "we believe that such a claim goes further than what Congress has authorized under RICO." *Id.* at 1099 (App. 16). Last, the Eleventh Circuit noted the danger of allowing "plaintiffs to circumvent the requirements of the first three subsections simply by alleging a conspiracy." *Id.* (App. 16-17) (citing *Bowman*, 985 F.2d at 388). In stark contrast to the contrary view, circuits holding in this manner have stated, "[f]or judges, under a conspiracy rubric, to allow RICO damages for an injury caused other than by an enumerated predicate offense would be tantamount to rewriting the statute." *Miranda*, 948 F.2d at 48.

The two lines of competing decisions are well-developed at this point; the sharp conflict continues to grow in the absence of any definitive resolution by this Court. No purpose is served by allowing this recurring issue to continue to be unresolved and to "percolate" any longer.

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[9] As noted in *Khurana*, however, " . . . the provision for conspiracy violations was part and parcel of Congress's intent and plan and cannot be ignored. *See Sedima*, 473 U.S. at 499, 105 S.Ct. at 3286 (noting that although RICO used in ways not originally envisioned, Congress and not the courts must amend statute)." *Khurana*, 130 F.3d at 153.

The importance of resolving the conflict between the circuits is perhaps best reflected by the present case. Beck's claims were originally asserted as cross-claims in a case pending in the United States District Court for the District of New Jersey. Under the Third Circuit precedent binding on that court, Beck unquestionably would have prevailed and been able to assert his claim. *Shearin*, 885 F.2d at 1168-70 (terminated whistleblower could assert RICO conspiracy claim); *Rehkop*, 95 F.3d at 288-91 (same). Beck had been terminated for his refusal to participate in and his blowing the whistle on the defendant directors' pattern of illegal conduct. Accordingly, under the holdings of the Third, Fifth and Seventh Circuits, Beck was injured by an overt act in furtherance of the RICO conspiracy and, thus, could assert a RICO conspiracy claim for the damage he suffered by virtue of his termination. *Id.*; *see also Khurana*, 130 F.3d at 152-53 (terminated whistleblower could assert RICO conspiracy claim); *Schiffels*, 978 F.2d at 348-51 (same).

Beck's claims, however, were severed and transferred to the United States District Court for the Southern District of Florida. There, the Eleventh Circuit joined the opposite camp of authority, holding that, to establish a RICO conspiracy claim, the overt act by which a plaintiff claims injury must be a predicate act of racketeering, as well. *Beck*, 162 F.3d at 1098-99 (App. 14-17). The transfer from the Third Circuit to the Eleventh Circuit, thus, completely altered the outcome on the determination of this important federal question. The change in geography, within the federal system, should not have meant a total change in the applicable federal law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Robert A. BECK, II, Plaintiff-Appellant,

v.

Ronald M. PRUPIS, Leonard Bellezza, Ernest J. Sabato, William Paulus, Jr., Harry Olstein, Frederick C. Mezey, Byron L. Sparber, Joseph S. Littenberg, Defendants-Appellees.

Robert A. BECK, II, Plaintiff-Appellee,

v.

Ronald M. PRUPIS, Leonard Bellezza, Ernest J. Sabato, William Paulus, Jr., Harry Olstein, Frederick C. Mezey, Byron L. Sparber, Joseph S. Littenberg, Defendants-Appellants.

Nos. 95-4844, 95-5586.

United States Court of Appeals,
Eleventh Circuit.

Dec. 15, 1998.

Jay Starkman, Delgado, Befeler, Starkman & Magolnick, P.A., Miami, FL, Elizabeth J. DuFresne, Steel Hector & Davis, Miami, FL, for Appellant in No. 95-4844.

Bernard S. Mandler Gunster, Miami, FL, Michael M. Rosenbaum, Budd, Larner, Gross, Rosenbaum, Greenberg & Sade, Short Hills, NJ, Kenneth R. Hartmann, Kozyak, Tropin & Throckmorton, P.A., Miami, FL, for Appellees in No. 95-4844.

Michael M. Rosenbaum, Budd, Larner, Gross, Rosenbaum, Greenberg & Sade, Short Hills, NJ, Kenneth R. Hartmann, Kozyak, Tropin & Throckmorton, P.A., Miami, FL, for Appellants in No. 95-5586.

Jay Starkman, Delgado, Befeler, Starkman & Magolnick, P.A., Miami, FL, for Appellee in No. 95-5586.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

This case hinges on the following question: Must a plaintiff bringing a civil RICO conspiracy claim prove that the overt act (in furtherance of the conspiracy) by which he was injured was an "act of racketeering"? We answer this question in the affirmative, and therefore affirm the district court's grant of summary judgment.

I.

This case arises out of the relationship between Robert A. Beck, II, the plaintiff, and members of the board of directors of the Southeastern Insurance Group (SIG).[1] SIG was a holding company founded in 1983. It

[1] Beck's claims were originally brought as cross-claims while he was a defendant in a shareholder derivative suit against SIG and its directors in the United States District Court for the District of New Jersey. While that suit was pending, SIG filed for bankruptcy and the bankruptcy trustee retained plaintiffs' counsel (in the derivative suit) to represent the estate of SIG as a co-plaintiff in the derivative suit. Beck's cross-claims were subsequently severed and transferred to the Southern District of Florida, from which this appeal comes. For ease of discussion, we treat the cross-claims as an original lawsuit, and refer to the parties as plaintiff and defendants.

owned three subsidiaries, all of which were in the business of writing surety bonds for construction contractors. The defendants in this case were all directors of SIG at one time.

In 1987, some of the directors of SIG (including the defendants) began engaging in improper activity. For instance, they set up an entity called Construction Performance Corporation (CPC), which extracted substantial "fees" from otherwise non-creditworthy contractors in order to qualify them for SIG surety bonds, in violation of insurance regulations. The directors reneged on promises to indemnify certain contractors, and diverted corporate funds to their personal use. Finally, these directors knowingly classified certain SIG liabilities as assets on SIG's financial statements, causing the statements drastically to overestimate the corporation's value. These false financial statements were then given to regulators, shareholders, and creditors.

This misconduct eventually led to a lawsuit by the Florida Department of Insurance and a shareholders' derivative suit against SIG's officers and directors. In January 1990, as a result of the illegal activities of certain SIG directors and the consequent lawsuits, SIG filed for bankruptcy in the Southern District of Florida.

Meanwhile, in August 1983, SIG had hired Beck to serve as president and as a member of the board of directors.[2] His employment contract, as revised in 1986, did not expire until 1991. The contract specified the grounds on which Beck's employment could justifiably be

[2] Beck was also CEO of SIG for a portion of his presidency.

terminated,[3] and stated that termination for any other reason would result in SIG being required to repurchase Beck's substantial stock holdings in the company. The repurchase price would be the fair market value of the stock as determined by an investment bank.

For most of his tenure, Beck was unaware of the illegal activities of the other SIG officers and directors. When he became aware of this misconduct in early 1988, he attempted to correct them internally and informed insurance regulators about improprieties in SIG's financial statements. The other directors, afraid that Beck might expose their misdeeds, arranged for a consulting firm to write a report criticizing Beck's performance, thus providing the directors an excuse to terminate Beck's employment without having to repurchase Beck's stock. In May 1988, Beck was fired.

While president, Beck made a number of unwise (in retrospect) personal financial decisions in relation to SIG. He purchased, as part of a 1986 private placement, a $150,000 debenture and $75,000 worth of stock, and (together with other directors), in December 1987, personally guaranteed a $7.5 million bank loan to SIG. When SIG filed for bankruptcy, Beck's SIG investments became practically worthless, and he became potentially liable for the bank loan.[4]

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[3] One such ground was "[Beck's] inability or substantial failure to perform [his] material duties."

[4] Beck never actually had to pay any of the guaranteed amount, but is suing for the attorney's fees he incurred in the subsequent lawsuit brought by the bank.

Beck claims that SIG's other directors fraudulently induced him to make these financial decisions.[5] Specifically, Beck claims that the defendants' failure to tell him about his impending termination[6] or about the illegal activities at SIG induced him to purchased the debenture and the stock. For these same reasons, along with the defendants' issuance of erroneous financial statements, Beck claims that he was fraudulently induced to guarantee the bank loan and to retain his stock longer than he would have otherwise.

Beck claims that these inducements, as well as the creation of fictitious reasons for his firing, constitute mail fraud, *see* 18 U.S.C. § 1341 (1994), and wire fraud, *see* 18 U.S.C. § 1343 (1994), on the part of the defendants. Furthermore, Beck claims that the combination of these offenses constitutes a "pattern of racketeering activity"[7] under the federal Racketeer Influenced and Corrupt

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[5] All of the other SIG directors were originally named as defendants in Beck's cross-claim. Some of these directors have since been dismissed from the case pursuant to settlement agreements.

[6] Beck alleges that the SIG directors had been planning to terminate his employment as president and director as early as 1987 (even before he discovered their wrongdoing), but concealed these plans from him. In addition, Beck was removed from his position as CEO in 1986; Beck alleges that SIG's directors had been planning to remove him much earlier but waited until after he had invested in SIG's private placement.

[7] Section 1961(1) of RICO defines the activities that constitute "racketeering activity"; these include mail and wire fraud. Section 1961(5) defines a "pattern of racketeering activity" as at least two acts of racketeering activity within ten years of one another.

Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1994), and that the defendants' participation in that pattern of racketeering activity injured him, giving him a private right of action based on RICO's substantive provisions. *See* 18 U.S.C. §§ 1962(c), 1964(c) (1994).[8] Beck also alleges that the defendants conspired to commit racketeering acts against third parties (through the phony financial statements, extortion of illegal fees, etc.); according to Beck, because his refusal to participate in and partial disclosure of that conspiracy resulted in his termination, he was injured "by reason of" the conspiracy and therefore has a claim under RICO's conspiracy provision, 18 U.S.C. § 1962(d).

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[8] Section 1964(c) of RICO creates a private right of action for anyone injured "by reason of" a violation of section 1962(a)-(d). Section 1962 consists of three substantive provisions, 18 U.S.C. § 1962(a)-(c), and one conspiracy provision, 18 U.S.C. § 1962(d). The three substantive provisions are structured as follows: Section 1962(a) prohibits the investment of proceeds derived from a pattern of racketeering activity in any enterprise involving interstate commerce. Section 1962(b) prohibits acquisition through a pattern of racketeering activity of any interest in an enterprise involving interstate commerce. Section 1962(c) prohibits participation in the conduct of an enterprise involving interstate commerce through a pattern of racketeering activity. Although Beck's cross-claim alleges violations of all three substantive provisions, he has not presented evidence to demonstrate that the defendants invested proceeds from the relevant racketeering activities in an enterprise involving interstate commerce, or that the defendants' racketeering activity led to acquisition of an interest in an enterprise involving interstate commerce. Beck therefore has no claim under section 1962(a) and (b). Beck has, however, presented evidence for a claim under section 1962(c); the alleged "enterprise" is SIG. We therefore treat all of his substantive claims as 1962(c) claims.

Beck sued the defendants for these alleged RICO violations, as well as numerous alleged violations of state law. The defendants moved for summary judgment and for sanctions pursuant to 28 U.S.C. § 1927 and Rule 11 of the Federal Rules of Civil Procedure. The district court granted the motion for summary judgment on Beck's RICO claims, and then declined to exercise supplemental jurisdiction over Beck's state law claims. The court denied the motion for sanctions. Beck appeals the summary judgment ruling, and the defendants appeal the denial of sanctions.

II.

Most of Beck's RICO claims allege substantive violations premised on 18 U.S.C. § 1962(c). We find these claims to be without merit, for the reasons discussed below.

A.

To prove any RICO violation, a plaintiff must prove the existence of a "pattern of racketeering activity." 18 U.S.C. § 1962. A variety of acts can constitute "racketeering activity," *see* 18 U.S.C. § 1961(1); the acts alleged in this case are mail and wire fraud, the substantive elements of which are identical.[9] *See Pelletier v. Zweifel*, 921 F.2d 1465, 1498 (11th Cir.1991). Both offenses consist of intentional participation in a scheme to defraud another of money or property. *See id.* A "scheme to defraud"

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[9] The only difference between the two offenses is their jurisdictional basis – mail fraud requires proof of the use of the mails, while wire fraud requires proof of the use of the wires.

involves the making of misrepresentations intended and reasonably calculated to deceive persons of ordinary prudence and comprehension. *See id.* at 1498-99. This means, *inter alia*, that the plaintiff must prove that a reasonable person would have relied on the misrepresentations. *See United States v. Brown*, 79 F.3d 1550, 1557 (11th Cir.1996).

In addition to proving racketeering activity, a civil RICO plaintiff must show that the racketeering activity caused him to suffer an injury. *See* 18 U.S.C. § 1964(c). This is true even when a criminal conviction for the underlying racketeering activity would not require a showing of actual injury, as is the case with mail and wire fraud. *See Pelletier*, 921 F.2d at 1499. Furthermore, the racketeering activity must be more than simply the "but for" cause of the injury; it must also be the proximate cause. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 1317-18, 117 L.Ed.2d 532 (1992). "[A] factor is a proximate cause if it is a substantial factor in the sequence of responsible causation." *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir.1994) (internal quotation omitted).

Because this case comes to us on a granted motion for summary judgment, we have viewed all evidence in favor of the non-moving party (i.e., Beck). *See Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc.*, 133 F.3d 1405, 1409 (11th Cir.1998). Summary judgment is to be granted when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment is appropriate where the moving party shows an absence of evidence to support an essential element of the nonmoving party's case. *See Weiss v. School*

Bd. of Hillsborough County, 141 F.3d 990, 994 (11th Cir.1998). For each alleged RICO violation in this case, Beck has failed to produce evidence to support at least one of the essential elements of a RICO claim based on mail and wire fraud. For this reason, we affirm the district court's grant of summary judgment.[10]

B.

Beck claims that he was fraudulently induced to make certain unwise financial decisions in three ways: (1) the defendants' failure to tell him about his impending

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[10] The district court held that Beck's injuries are based on his status as a creditor and stockholder, and that his injuries are therefore too indirect to give him standing under RICO. The district court is correct that a creditor or stockholder lacks standing when his claim is based solely on acts of racketeering that target the corporation. *See Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 906 (11th Cir.1998); *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir.1987). A plaintiff's status as a creditor or stockholder, however, does not preclude standing for RICO violations if the plaintiff has alleged an injury proximately caused by the defendants' acts of racketeering that target the plaintiff. *See id.* at 1530-31. In this case, Beck has properly set forth claims of injury proximately caused by racketeering activity that targeted him. We therefore hold that he has standing under RICO. However, after numerous pleadings, depositions, and affidavits, Beck has not brought forward evidence that would create a genuine issue of material fact on certain key elements of his claims. Thus, we affirm the decision of the district court, but on different grounds. *See Turner v. American Fed. of Teachers Local 1565*, 138 F.3d 878, 880 n. 1 (11th Cir.1998) ("We must affirm the judgment of the district court if the result is correct even if the district court relied upon a wrong ground or gave a wrong reason.").

termination, (2) the defendants' failure to inform him of their illegal activities, and (3) the defendants' creation of false financial statements. Although two of these inducements are omissions rather than direct misrepresentations, material omissions can be the basis for a claim of fraud if they are intended to create a fraudulent representation. *See United States v. O'Malley*, 707 F.2d 1240, 1247 (11th Cir.1983).

The defendants' failure to tell Beck of his impending termination cannot serve as the basis for a claim of fraud, because a reasonable person making financial decisions would not have relied on such an omission. Beck's employment contract makes no guarantee of employment throughout the term of the contract. On the contrary, the contract has an explicit termination provision that prescribes, in substantial detail, what is to happen if SIG terminates Beck's employment for any reason. Thus, the employment contract itself explicitly contemplates the possibility of termination (both "for cause" and "without cause"), and Beck therefore could not have reasonably relied on continuing employment.[11] Furthermore, Beck has presented no evidence that the defendants refrained from telling him of his impending termination in an attempt to induce him to make financial commitments to

[11] Beck also claims that the private placement memorandum issued in conjunction with the stock/debenture offering in which he invested contained an affirmative misrepresentation that he would continue as president and CEO of SIG. This alleged "misrepresentation," however, is merely a list of the current officers and directors of SIG; it cannot reasonably be read as a promise of continuing employment.

SIG. He therefore has not proven the essential element of intent.

The defendants' failure to tell Beck about their illegal activities also cannot serve as the basis for a claim of fraud, because, here again, Beck has presented no evidence of the defendants' fraudulent intent to induce Beck to make these investment decisions. The usual reason why people do not disclose that they are engaging in illegal activity is that they do not want to get caught, not because they want to induce others to invest. Beck has produced no evidence suggesting that, in this case, the omission was intended to induce Beck to make financial commitments to the company. Also, Beck has presented no evidence that this omission proximately caused his losses. He has repeatedly stated that had he known about the illegal activities, he would not have made the same financial decisions. As noted above, however, this type of "but for" causation is insufficient to sustain a claim of fraud. Instead, proximate cause is required, meaning that this omission must have been a "substantial factor" in his decisionmaking. *See Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir.1994); *see also Brandenburg v. Seidel*, 859 F.2d 1179, 1189 (4th Cir.1988) (stating that the inquiry in determining the existence of proximate cause is "whether the conduct has been so significant and important a cause that the defendant should be held responsible" (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 42 (5th ed.1984))). Beck has presented no evidence (other than the "but for" testimony) that one of the substantial factors

in his decision to make certain financial commitments to SIG was his belief that the company was run legally.[12]

Finally, the defendants' creation of false financial statements cannot serve as the basis for Beck's allegations of fraud, again because of a lack of evidence of fraudulent intent toward Beck.[13] It is surely true that, if the defendants misrepresented certain transactions and intentionally overstated the value of SIG, they intended to deceive someone. There is no evidence, however, that the someone to be deceived was Beck. The more likely target of deception, based on the evidence, was First Fidelity Bank, from whom SIG was seeking a loan. Beck has also failed to demonstrate proximate cause -- he has presented no evidence that he actually saw, let alone relied upon, any false financial statements prior to making his financial decisions.[14]

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[12] Beck has also suggested that the defendants' illegal activities led to SIG's demise, which in turn caused Beck's losses (the reduction in value of his investments and the accountability for the loan he guaranteed). This claim is clearly barred by the proximate cause requirement – the detrimental effects of racketeering activity directed toward a third party (in this case, SIG) are not actionable under RICO. *See Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 906 (11th Cir.1998). This is the type of derivative claim that the district court correctly held does not confer standing under RICO. *See supra* note 10.

[13] The same is true of the erroneous "Claims Summaries" on which Beck claims to have relied.

[14] Beck also suggests that the defendants' failure to inform him of the illegal transaction that led to the creation of the inaccurate financial statements constitutes a fraudulent misrepresentation by omission. This claim – that the concealment of SIG's illegal activities constitutes a fraudulent inducement – has already been addressed.

C.

Beck also alleges that the defendants violated RICO by creating fraudulent reasons for terminating his employment. The purported fraud consists of arranging for a consulting group to issue a report containing false allegations regarding Beck's job performance, and then using this report as a basis for firing him. It does not appear, however, that Beck was injured through reliance on the fraudulent report. The only persons who might have relied on the report are the directors of SIG, when making their decision to terminate Beck. Because Beck did not rely to his detriment on the alleged misrepresentations, these misrepresentations are not the proximate cause of Beck's injury. *See Pelletier*, 921 F.2d at 1499-1500.

Furthermore, as with Beck's other claims, there is no evidence of the defendants' intent to defraud Beck. Indeed, Beck claims not to have been deceived at all – he has long been aware that the allegations in the consulting report were false, and that the true reason he was fired was that he posed a threat to the defendants' illegal activities. The apparent object of the defendants' fraud was a prospective court, one that might someday hear a claim by Beck of breach of contract. In essence, Beck's claim in regard to his firing is that SIG ought to have been required to repurchase his stock and breached its contract by not doing so. Whatever the merits of this claim at common law, it is different from a federal statutory claim that the defendants committed mail and wire

fraud in firing Beck. Consequently, Beck's firing is not an act of racketeering under RICO.

III.

Beck's allegation that he was fired for pretextual reasons is also the basis for his claim under RICO's conspiracy provision, 18 U.S.C. § 1962(d). A civil RICO conspiracy claim requires a showing of the existence of a conspiracy, and the commission of an overt act in furtherance of the conspiracy that causes injury to the plaintiff. *See Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Fla., Inc.*, 906 F.2d 1546, 1550 n. 7 (11th Cir.1990). Beck argues that the defendants' conspiracy to commit various racketeering activities led to his firing (because Beck refused to participate in such activities and because Beck "blew the whistle" on certain SIG misconduct); he therefore suffered injury resulting from an overt act (the wrongful termination) done in furtherance of the conspiracy. To support this argument, Beck relies on cases from other circuits holding that a terminated "whistle blower" has standing to bring a claim under RICO's conspiracy provision, even if no such claim is available under RICO's substantive provisions.[15]

The Eleventh Circuit, however, has apparently rejected this reasoning, and rightly so – a terminated

[15] *See Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344 (7th Cir.1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir.1989). *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 153-54 (5th Cir.1997), decided subsequent to argument in this case, also supports Beck's claim.

whistle blower, although he may have a wrongful termination claim, has not suffered an injury that was proximately caused by the defendants' *racketeering* activities. *See Morast v. Lance*, 807 F.2d 926, 933 (11th Cir.1987) (holding that retaliatory discharge for blowing the whistle, standing alone, is not grounds for a RICO conspiracy claim); *O'Malley v. O'Neill*, 887 F.2d 1557, 1561-62 (11th Cir.1989) (broadening *Morast's* holding regarding whistle blower claims to include refusal to participate in illegal activity).[16] There is a substantial debate in the federal courts of appeals regarding whether the overt act necessary for a RICO conspiracy must be an act of racketeering as defined in section 1961(1).[17] In the context of RICO's substantive provisions, the Supreme Court has held that a plaintiff's injuries must have been proximately caused by acts of racketeering. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-69, 112 S.Ct. 1311, 1316-18, 117 L.Ed.2d 532 (1992). We believe that this reasoning applies equally well to RICO's conspiracy provisions. Furthermore, RICO was enacted with an express target – racketeering activity – and only those injuries that are

[16] The majority of other circuits considering this issue have also concluded that allegations of retaliatory discharge for interference with racketeering activity ("whistle blower" claims) do not satisfy RICO's proximate cause requirement. *See Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir.1993); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 48 (1st Cir.1991); *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 294-95 (9th Cir.1990); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir.1990).

[17] *See* cases cited in notes 15 and 16, *supra*; *see also Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 290 (3d Cir.1996); *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1344-46 (2d Cir.1994).

proximately caused by racketeering activity should be actionable under the statute. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir.1990) ("Congress did not deploy RICO as an instrument against all unlawful acts. It targeted only predicate acts catalogued under section 1961(1)."); *cf.* H.R.Rep. No. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4032 ("If there is no racketeering activity . . . there can be no violation of the provisions of this title."). Although a "whistle blower" claim such as Beck's could perhaps have a deterrent effect on racketeering, we believe that such a claim goes further than what Congress has authorized under RICO. As the Supreme Court noted in *Holmes*, the need to deter injurious conduct can be amply met through suits by those persons directly injured. *See Holmes*, 503 U.S. at 269-70, 112 S.Ct. at 1318-19.

The requirement that a civil RICO plaintiff prove injury resulting from a racketeering act does not, as Beck and some courts have suggested, render the RICO conspiracy provision superfluous. *See Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 153 (5th Cir.1997); *Bowman v. Western Auto Supply*, 985 F.2d 383, 388 (8th Cir.1993). Rather, the conspiracy provision allows persons who are responsible for an injury, but did not actually participate in the injury-causing activity, to be held liable.[18] Furthermore, requiring proof of direct injury by

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[18] The function of a conspiracy claim differs in criminal and civil cases. In a criminal context, the purpose of conspiracy charges is to punish the act of agreement itself. *See* Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 6.4(d) (2d ed.1986). Agreements to engage in criminal activity are considered dangerous to society in and of themselves, because

racketeering activity for section 1962(a)-(c), but not for section 1962(d), would (in addition to being logically inconsistent) allow plaintiffs to circumvent the requirements of the first three subsections simply by alleging a conspiracy. *See id.*

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of "the special danger incident to group activity." *Id.* at § 6.4(c). Thus, for a criminal conspiracy charge, there is no need to prove that the conspiracy led to an injury-causing criminal activity. In a civil context, however, the purpose of a conspiracy claim is to impute liability – to make X jointly liable with D for what D did to P. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 46 (5th ed.1984). Thus, a civil conspiracy plaintiff must prove that someone in the conspiracy committed a tortious act that proximately caused his injury; the plaintiff can then hold other members of the conspiracy liable for that injury. Those courts that have recognized a claim such as Beck's usually rely on criminal RICO cases, thus demonstrating a possible confusion about the separate functions of civil and criminal conspiracy claims. *See Schiffels*, 978 F.2d at 348 (relying on numerous criminal cases); *Shearin*, 885 F.2d at 1169 (relying on criminal case of *United States v. Brooklier*, 685 F.2d 1208 (9th Cir.1982)).

This distinction also explains why *Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997), relied upon by Beck, is not relevant here. *Salinas* states that criminal RICO conspiracy has no overt act requirement – the agreement itself is sufficient to establish culpability. This is a very different matter from the requirements for civil RICO conspiracy:

> [A]lthough an overt act by itself . . . is not a requisite element of a section 1962(d) criminal conspiracy violation, we hold that injury from an overt act is necessary and sufficient to establish civil standing for a RICO conspiracy violation. We cannot agree, however, with cases . . . that find standing on the basis of *any* overt act in furtherance of the conspiracy, even if it is not a predicate racketeering act.

Hecht, 897 F.2d at 25 (citation omitted).

As discussed in part II.C, *supra*, Beck has presented no evidence that his termination was the result of racketeering activity directed toward him. Thus, we affirm the district court's grant of summary judgment on Beck's RICO conspiracy claim.

IV.

The district court, upon granting summary judgment on Beck's only federal claim (the RICO claim), declined to exercise supplemental jurisdiction over Beck's remaining state law claims. The exercise of supplemental jurisdiction is left to the discretion of the district court; we review for an abuse of discretion. *See Edwards v. Okaloosa County*, 5 F.3d 1431, 1433 (11th Cir.1993). We find such an abuse here, and therefore reverse the district court's ruling.

The district court's ruling improperly relied on 28 U.S.C. § 1367(c)(3). Section 1367 applies only to civil actions commenced after December 1, 1990. *See* Judicial Improvements Act of 1990, Pub.L. No. 101-650, § 310(c), 104 Stat. 5089, 5114 (1990). Beck's cross-claim was filed on May 28, 1990. Thus, the common law of pendent jurisdiction, rather than section 1367, applies to this case.

Ordinarily, this distinction would be of little importance. *See Kaufman v. Checkers Drive-In Restaurants, Inc.*, 122 F.3d 892, 893 n. 2 (11th Cir.1997) (noting that section 1367 codifies pre-existing criteria for exercising pendent jurisdiction). However, a dismissal under section 1367 automatically tolls the statute of limitations on the dismissed claims for 30 days, *see* 28 U.S.C. § 1367(d) (1994),

while a dismissal under the doctrine of pendent jurisdiction does not have this effect. Beck claims that the applicable statute of limitations would bar his state law claims if they were dismissed at this stage. The possibility of a claim being time-barred is an important factor in deciding whether to maintain jurisdiction over pendent claims once the federal claims have been resolved; dismissing state law claims for which the statute of limitations has run will often constitute an abuse of discretion. *See Edwards*, 5 F.3d at 1435; *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 430 (11th Cir.1984); *Pharo v. Smith*, 625 F.2d 1226, 1227 (5th Cir.1980).[19]

The district court presumably did not address the statute of limitations issue because it assumed that Beck's state law claims would be protected under 28 U.S.C. § 1367(d). Because section 1367 is not the applicable law, the district court's decision leaves the status of Beck's state law claims unclear.[20] We therefore reverse the district court's ruling on this issue and remand for further consideration of Beck's pendent state law claims.

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[19] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[20] If the district court intended to refuse to exercise pendent jurisdiction while still preserving Beck's state law claims for review in state court, it could accomplish this on remand by requiring the defendants to file a waiver of any statute of limitations defense as a condition of dismissal. *See Edwards*, 5 F.3d at 1435 n. 3.

V.

The defendants moved for sanctions against Beck under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927. The district court denied both motions; we review for an abuse of discretion. *See Glatter v. Mroz (In re Mroz)*, 65 F.3d 1567, 1571-72 (11th Cir.1995). We do not find Beck's claims to be so meritless that the district court's denial of sanctions constitutes an abuse of discretion.[21]

The defendants also challenge the district court's ruling on their motion to tax costs to the plaintiff. The defendants moved to tax the costs of all depositions taken, of photocopying necessary in conjunction with document production, of serving various subpoenas and summonses, and of the court costs affiliated with appearing *pro hac* vice. The district court taxed to Beck only those costs incurred in deposing him and in photocopying the motion for summary judgment. This ruling is reviewed for an abuse of discretion, *see Tanker Management, Inc. v. Brunson*, 918 F.2d 1524, 1527 (11th Cir.1990); we find no such abuse here.

VI.

Defendant Byron L. Sparber was dismissed from this action on the ground of inadequate service of process.

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[21] The parties dispute which version of Rule 11 (the pre-1993 or post-1993 version) applies, because the defendants concede that they did not comply with the 21-day safe harbor provision found in the post-1993 version. *See* Fed.R.Civ.P. 11(c)(1)(A). We do not reach this issue, because we conclude that, even if the pre-1993 version applies, there was no abuse of discretion.

Beck concedes that service was improper, but argues that Sparber should be barred from claiming inadequate service of process under the doctrine of laches. Specifically, Beck argues that Sparber's delay in raising this issue has created the possibility that Beck's claims against Sparber will be time-barred. Furthermore, Beck argues that Sparber has waived any defense of inadequate service of process through a notice of appearance filed by his attorney (which Sparber and his attorney claim was filed inadvertently) and by the involvement of Sparber's attorney in the case (which Sparber's attorney claims was solely on behalf of another client, defendant Joseph S. Littenberg).

Although we review the district court's interpretation of the Federal Rules of Civil Procedure *de novo, see Silvious v. Pharaon*, 54 F.3d 697, 700 (11th Cir.1995), we review the district court's factual findings only for clear error, *see American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir.1998). The district court's decision in this matter was based primarily on a series of factual determinations – whether Sparber or Beck is to blame for the delay, whether Sparber's notice of appearance was inadvertent, whether Sparber's attorney was solely representing Littenberg during the proceedings, and so forth. We cannot say that the district court's factual findings in this regard were clearly erroneous, and we therefore affirm the district court's dismissal of Sparber from this action.

VII.

For the foregoing reasons, we AFFIRM the district court's grant of the defendants' motions for summary judgment; we VACATE the district court's dismissal of Beck's state law claims and REMAND the case with the instruction that the district court reconsider its order dismissing Beck's pendent state law claims; we AFFIRM the district court's denial of sanctions; we AFFIRM the district court's ruling on the defendants' motion to tax costs; and we AFFIRM the district court's dismissal of defendant Sparber from this action.

SO ORDERED.

ROBERT A. BECK,

Plaintiff,

v.

RONALD M. PRUPIS, ET AL.,

Defendants,

_____/

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO: 91-8121-CIV-ROETTGER

ORDER ON THE BELLEZA GROUP'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on defendants Leonard Belleza, Ernest J. Sabato, William Paulus and Harry Olstein's (the Belleza Group's) motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. A hearing was held on the motion on Friday, April 28, 1995.

A. FACTUAL BACKGROUND

The Southeastern Insurance Group, Inc. ("SIG") was a holding company whose subsidiaries operated various businesses, including insurance and surety. Plaintiff Robert A. Beck first became associated with SIG on August 22, 1983 when he was hired under a five-year employment contract as President of SIG. Beck's contract was later extended. In August, 1986, Beck made an unsecured personal loan to SIG in the amount of $150,000. Around December, 1987, Beck personally guaranteed a $7.5 million loan from First Fidelity Bank to SIG. SIG eventually defaulted on the First Fidelity loan and First Fidelity sued Beck on the personal guarantee. Beck

also purchased stock in SIG during his employment there. In addition to his role as President, Beck later was named Chief Executive Officer of SIG. On May 13, 1988, SIG's Board of Directors voted unanimously with the exception of Beck to terminate Beck "for cause." On January 5, 1990, SIG filed a petition for bankruptcy in the Southern District of Florida.

Beck alleges that beginning in the fall of 1985, the defendants devised a scheme to defraud Beck and others and, in addition, used their positions at SIG to extort potential customers. Beck alleges that as part of this scheme to defraud, the defendants fraudulently induced Beck to make the unsecured $150,000 loan to SIG and to be a personal guarantor on the $7.5 million First Fidelity loan to SIG. Beck further alleges that the defendants fraudulently induced him not to sell his stock in SIG by concealing from him the allegedly illegal activities of SIG. Beck further alleges that when he, as President of SIG, became a threat to the continued racketeering conduct of the defendants, the defendants fraudulently created causes for Beck's termination.

B. PROCEDURAL HISTORY

Beck's claims come to this court by way of a state court action and a crossclaim in a federal action in New Jersey. On May 15, 1989, Beck filed a complaint in Dade County Circuit Court under Florida's civil RICO act, *Fla. Stat. Ann.* § 772.101 *et seq.*, and Florida common law. He named as defendants all of the defendants in the present action plus SIG, itself. The defendants filed a motion to dismiss challenging Beck's standing to allege claims

under Florida's RICO provisions and Beck's ability to state claims on which relief may be granted on the common law counts. On November 28, 1989, the court entered an order granting in part and denying in part the defendants' motion to dismiss. On the RICO standing issue, the court held that Beck had standing to allege conspiracy to violate Florida's RICO act. But the court held that Beck did not have standing to allege violations of the substantive provisions of Florida's RICO act.[1] After the order had been entered, Beck voluntarily dismissed the remaining counts pursuant to Rule 1.420, Florida Rules of Civil Procedure.

In the meantime, on August 10, 1989, the New Jersey State Insurance Commissioner as Receiver had filed suit in federal court in New Jersey naming SIG and its officers and directors as defendants. These officers and directors included Beck and the defendants Beck had named in his state court action. Having dismissed his state court action, Beck then filed a crossclaim against the remaining defendants in the New Jersey action. The crossclaim contained ten counts including four counts under the federal civil RICO provisions, Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* – three

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[1] The order also disposed of the common law counts. It denied the motion to dismiss count V, alleging breach of contract, granted the motion to dismiss counts VI and VII, tortious interference and conspiracy to tortiously interfere, respectively, and granted Beck leave to amend counts VIII and IX, defamation and conspiracy to defame, to plead those counts with additional specificity.

substantive claims and one conspiracy claim.[2] After the court in New Jersey dismissed the underlying complaint to which Beck had appended his crossclaim, it transferred Beck's crossclaim to this district. The present action is Beck's crossclaim.

This action now is before the court on the Belleza Group's motion for summary judgment. In it, the Belleza Group argues that Beck lacks standing to bring RICO claims. They first argue that *res judicata* bars Beck's claims because he did not assert them in the prior state court action that the Belleza Group alleges was based on the same underlying facts. Alternatively, they argue that Beck lacks standing to bring a RICO claim because his injuries are derivative and not direct.

C. RES JUDICATA

Res judicata encompasses two different preclusion doctrines: claim preclusion and issue preclusion. *Pelletier v. Zweifel*, 921 F.2d 1465, 1501 (11th Cir. 1991). Claim preclusion bars the litigation of matters that could have been litigated in an earlier suit, but were not. *Id.*; *Albrecht v. State*, 444 So.2d 8 (Fla. 1984). Issue preclusion bars the relitigation of matters that were actually litigated and decided in a prior suit. *Pelletier v. Zweifel*, 921 F.2d at 1501; *see also Stogniew v. McQueen*, 1995 Fla. LEXIS 679 (Fla. 1995).

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[2] Beck's crossclaim also contained six counts brought under Florida common law alleging theories of fraud, negligence, and fraudulent inducement.

1. CLAIM PRECLUSION

Claim preclusion bars a plaintiff from bringing a subsequent lawsuit when four requirements are met: (1) there must be a final judgment on the merits, (2) the prior decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits, and (4) the same cause of action must be involved in both cases. *Pelletier v. Zweifel*, 921 F.2d at 1501; *see also Stogniew v. McQueen*, 1995 Fla. LEXIS 679 (Fla. 1995).

Regarding the first requirement – that there be a final judgment on the merits – the Full Faith and Credit implementing statute, 28 U.S.C. § 1738, requires this court to give the same dignity to a judgment rendered by a Florida court as would another Florida court. *Pelletier*, 921 F.2d at 1501; *see also Luebke v. Marine National Bank of Neenah*, 567 F. Supp. 1460, 1461 (E.D. Wisc. 1983).

The issue here presented thus is whether a Florida court would consider Beck's action in Dade Circuit Court to have given rise to a valid final judgment. Under Florida law, a final judgment is one that determines the rights of the parties and disposes of the case on the merits, leaving nothing more to be done in the case except execution. *Allie v. Ionata*, 503 So.2d 1237 (Fla. 1987).

The Dade Circuit Court's order granting in part and denying in part defendants' motion to dismiss cannot be considered final judgment for the purposes of claim preclusion. It dismissed certain counts of Beck's complaint because Beck lacked standing to bring substantive claims under Florida's RICO act. But it left standing other counts and allowed Beck the opportunity to amend still other

counts. The order did not determine the rights of the parties and dispose of the case on the merits. Moreover, because counts remained undisposed of, it did not leave nothing more to be done in the case except execution. As a result, it was not a final judgment even as to the counts dismissed with prejudice.

Thereafter, Beck voluntarily dismissed without prejudice the remaining counts of the case. Rule 1.420, Florida Rules of Civil Procedure, gives a party an *absolute* right to take a voluntary dismissal at any time prior to a hearing on a motion for summary judgment, before the jury retires, or before submission of a nonjury case to the court. *Baker v. Firestone Tire & Rubber Co.*, 537 F. Supp. 244, 247 (S.D. Fla. 1982) (emphasis added); *Fears v. Lunsford*, 314 So.2d 578 (Fla. 1975); *see also* 1 Fla. Jur. 2d § 109. Under the Florida Rules of Civil Procedure, like the Federal Rules of Civil Procedure, a voluntary dismissal without prejudice simply is not a final decision on the merits. *See New Port Largo, Inc. v. Monroe County*, 706 F. Supp. 1507, 1513 (S.D. Fla. 1988) ("Florida courts generally consider voluntary dismissal to be beyond the scope of res judicata."); 33 Florida Jur. 2d § 173; *see also In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213 (8th Cir. 1977) (analyzing the effect of voluntary dismissal under Rule 41, Federal Rules of Civil Procedure) ("The effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties as if the action had never been brought. It carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and defendants, and all issues, with respect to plaintiff's claim.").

As a result, there was never a final judgment on the merits in the Dade Circuit case. By voluntarily dismissing his state court suit Beck terminated the litigation instantaneously. *See Baker v. Firestone Tire & Rubber Co.*, 537 F. Supp. at 247. Because the dismissal was without prejudice, Beck was free to commence a wholly new lawsuit against the same defendants (assuming the right to do so had not been exercised before and was not then barred by the statute of limitations – neither issue having been raised here). *See id.* Accordingly, no claim preclusion applies to the case.

2. ISSUE PRECLUSION

Issue preclusion presents a closer question, but nevertheless cannot apply here. Issue preclusion[3] estops parties from litigating in a second suit an issue that was "actually litigated" in the prior suit and that is common to both the first and second causes of action. *Pelletier v. Sweifel*, [sic] 921 F.2d 1465, 1501 (11th Cir. 1991); *Gjellum v. City of Birmingham, Ala.*, 829 F.2d 1056, 1059 (11th Cir. 1987); *see also Restatement (Second) of Judgments* § 27, cmt. d.

An issue is "actually litigated" when it "is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." *Id.* "An issue may be submitted and determined on a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, a motion for directed verdict, or their equivalents, as well as on a judgment entered on a verdict." *Id.*

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[3] also referred to as collateral estoppel or estoppel by judgment.

In Beck's state court case, the issue of whether Beck had standing to assert RICO claims was presented on a motion to dismiss and determined by the Dade Circuit Judge in a written order dated November 29, 1989. Accordingly, the RICO standing issue now before the court already has been "actually litigated" for purposes of issue preclusion.

The court concedes that discarding the state court opinion and deciding the standing issue again arguably would allow Beck to secure a second opportunity to relitigate an issue that already has been pressed to a clear decision by a state court. *See* 18 *Wright, Miller & Cooper, Federal Practice and Procedure* § 4434 (1981).

Nevertheless, where the full faith and credit statute applies, as it does here, a federal court may not give a state court judgment greater issue preclusive effect than would the courts of the judgment rendering state. *Gjellum v. City of Birmingham, Ala.*, 829 F.2d 1056, 1059 (11th Cir. 1987). A Florida court would not give issue preclusive effect to the Dade Circuit Court's determination of Beck's standing to bring RICO claims because, as set forth previously, no final, appealable judgment was reached in the Dade Circuit Court case. *See Mobile Oil Corporation v. Shevin*, 354 So.2d 372, 374 (Fla. 1977) (holding that the essential elements of the doctrine as framed by Florida courts require that "the parties and issues be identical and that the particular matter be fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction."); *Weigh Less for Life v. Barnett Bank of Orange Park*, 399 So.2d 88, 90 (1st DCA 1981) ("The order granting the motion to dissolve the prejudgment writ did not finally dispose of the case, and

therefore cannot provide the foundation for a claim of [issue preclusion]."); *see also In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213, 218-221 (8th Cir. 1977); *Kaspar Wire Works, Inc. v. Leco Engineering & Machinery, Inc.*, 575 F.2d 530, 538 n. 11 (5th Cir. 1978); 18 *Wright, Miller & Cooper, Federal Practice and Procedure* § 4434 (1981) ("A very special problem is presented when pretrial rulings that might have been suitable for preclusion before final judgment are followed by events that forestall any judgment or appeal.").[4]

Because neither claim nor issue preclusion applies here, the court must now decide the RICO standing issue again.

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[4] Having concluded that no final judgment was entered in the prior state court action, the court does not reach two difficult issues. First, whether Beck's state court complaint and his crossclaim share an "identity of the facts essential to the maintenance of the action[s]." *See Husky Industries, Inc. v. Griffith*, 422 So.2d 996, 999 (5th D.C.A. 1982). If so, the identity of cause of action element of claim preclusion under Florida law would be satisfied, which would appear to give rise to claim preclusion. *See id.* If not, then a second issue arises: whether the Dade Circuit Court's determination of the issue of Beck's standing under Florida's civil RICO provisions precludes the relitigation of Beck's standing under the federal RICO provisions. Florida's Rico provisions are patterned after federal Rico provisions. *See generally* Jennifer Daley, "Tightening the net of Florida's Rico Act," 21 Fla. St. U. L. Rev. 381 (Fall, 1993). Because no final judgment was entered in the prior state court action, however, the court reaches neither of these issues.

D. BECK'S STANDING UNDER RICO

The civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therfor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney's fee." Thus, in order to have standing to sue for damages on a civil RICO claim, a plaintiff must show (1) that he was injured in his business or property, (2) that section 1962 was violated, and (3) that the plaintiff was injured "by reason of" the section 1962 violation. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir. 1994); *O'Malley v. O'Neill*, 887 F.2d 1557, 1561 (11th Cir. 1989).

A standing analysis is employed to refuse to determine the merits of a legal claim on the grounds that, even though the claim may be correct, the litigant advancing it is not properly situated to be entitled to its judicial determination. *See* 13 *Wright, Miller & Cooper, Federal Practice and Procedure* § 3531 (1984). The focus in a standing analysis is on the party, not the claim itself. *Id.*

When an attack on standing occurs via a motion for summary judgment, the plaintiff "must set forth by affidavit or other evidence specific facts . . . which for purposes of the summary judgment motion will be taken to be true." *Jacobs v. Florida Bar*, 50 F.3d 901 (11th Cir. 1995); Rule 56(e), Federal Rules of Civil Procedure.

The court assumes without deciding that the injuries Beck asserts in his crossclaim – loss of an unsecured loan

to SIG, loss of employment, guaranty of a loan, loss of the value of his stock in SIG, attorneys' fees and costs incurred in a suit on a guaranty – are injuries to business or property. The court further assumes that the pattern of racketeering activity Beck sets forth constitutes a violation of section 1962 – either the substantive provisions or the conspiracy provision.[5] The court focuses its analysis on the third element: whether the plaintiff was injured "by reason of" the section 1962 violation.[6]

It may well be true that the violations of section 1962 Beck alleges constituted the "but for" cause of the injuries Beck sustained. *See Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1317 (1992); *O'Malley v. O'Neill*, 887 F.2d 1557, 1561 (11th Cir. 1989). But, despite the broad language of section 1964, RICO does not provide a remedy for every injury that may be traced to predicate acts. *Id.* "It is well-established that RICO plaintiffs must prove proximate causation in order to recover." *Holmes*, 112 S. Ct. 1317-18; *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991). In other words, causation principles generally applicable to tort liability must be considered applicable

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[5] Section 1962(a), (b) and (c) set forth substantive RICO crimes. Section 1962(d) makes it a crime to conspire to violate sections 1962(a), (b), or (c).

[6] The Dade Circuit court's decision turned on whether there was a RICO violation, apparently finding that Beck met the injury and causation requirements. The Dade court found that Beck adequately alleged a RICO conspiracy claim, but did not adequately allege substantive RICO claims. By contrast, the Court here assumes without deciding that Beck met the injury requirement and that the defendants violated section 1962 under either the substantive or conspiracy provisions and bases its holding on the causation element of section 1964.

in RICO cases. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994). In the 11th Circuit, a plaintiff has standing to sue under section 1964(c) only if his injury flowed *directly* from the commission of the predicate acts. *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991).

In *Pelletier*, the 11th Circuit stated that

> [t]here is some question whether this proximate cause requirement limits damages recoverable to those caused directly by the predicate act (e.g., by reliance on fraudulent misrepresentations) or to those caused indirectly by the predicate act (e.g., by purchasing property at a price that has been artificially inflated by a scheme to defraud). We have taken the more restrictive view, holding that a plaintiff has standing to sue under section 1964(c) only if his injury flowed *directly* from the commission of the predicate acts. This means that, when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme.

Id. at 1499-1500 (citations omitted) (emphasis added).[7]

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[7] Though *Pelletier* preceded *Holmes*, the Supreme Court in *Holmes* did not overturn or limit *Pelletier*. To the contrary, the Court explicitly left standing *Pelletier*. *See Holmes*, 112 S. Ct. at 1320 n. 20 ("[O]ur use of the term "direct" should merely be understood as a reference to the proximate-cause enquiry [sic] that is informed by concerns set out in the text. We do not necessarily use it in the same sense as courts before us have, and intimate no opinion on results they reached. See, e.g., . . . *Pelletier*, 921 F.2d at 1499-1500. . . . "). Thus, though at least one other circuit has criticized as overly restrictive the 11th Circuit's RICO causation standard followed in *Pelletier*, *see Zervas v. Faulkner*, 861 F.2d 823, 833-34 (5th Cir. 1988) (asserting that the 11th Circuit's RICO standard denying RICO recovery if the plaintiff's injury did not flow *directly* from the predicate acts may be overly restrictive as set forth in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987)), the 11th Circuit's RICO causation standard as set forth in *Pelletier* remains binding precedent in this circuit.

Thus, to have standing in this case, Beck must set forth facts through affidavits or other evidence that, if taken as true, show an injury to him that flowed directly from the defendants' fraudulent scheme. *See Pelletier v. Zweifel*, 921 F.2d at 1499. Because the predicate acts Beck alleges are mail fraud, Beck must show both that he was a target of the scheme to defraud *and* that he relied to his detriment on misrepresentations made in furtherance of that scheme. *See Id.* at 1499-1500.

Beck lists approximately 50 predicate acts in his RICO case statement. *See* Plaintiff's response to RICO case standing order (DE 25). But in his statement of material facts submitted in opposition to the Belleza Group's summary judgment motion, Beck concedes that he was not injured directly from many of these predicate acts. *See* Plaintiff's statement of material facts in opposition to the New Jersey Group's motion for summary judgment at 5 (DE 163). Instead, Beck sets forth four predicate acts he alleges were committed directly against him:

> 1. The defendants' fraudulent inducement of Beck to extend a $150,000 loan to the defendants' enterprise.

2. The defendants' fraudulent inducement of Beck to personally guaranty a $7.5 million loan to the defendants' enterprise.

3. The defendants' fraudulent inducement of Beck to purchase stock in the defendants' enterprise and fraudulently causing him to fail to sell his stock until it was too late; and

4. The defendants' fraudulent creation of causes for Beck's termination due to his threat to their continued racketeering conduct.

Id. at 5-6.

Having considered this list of predicate acts from which Beck claims he was directly injured, it is clear that Beck brings suit in several capacities. First, Beck sues as a creditor of SIG based on SIG's failure to pay back a $150,000 loan he made to SIG and. Second, Beck sues as a guarantor based on his personal guarantee of the $7.5 million loan First Fidelity made to SIG. Beck became personally liable for this loan when SIG defaulted on it. Third, Beck sues as a stockholder alleging that he bought SIG stock, and failed to sell it until it had dropped in value. Fourth, Beck sues as an employee. Beck claims he was terminated as a result of his threat to the continued racketeering conduct. Bearing in mind that a standing analysis focuses on the party, not the claim, *see* 13 *Wright, Miller & Cooper, Federal Practice and Procedure* § 3531 (1984), the essential question thus is whether a creditor, a guarantor, a stockholder, or an employee has standing to sue under RICO. To proceed to trial, Beck must show that he has standing to sue in one or more of these capacities.

1. BECK'S STANDING AS A CREDITOR AND GUARANTOR.

Beck alleges that he has standing because he was fraudulently induced to make a $150,000 unsecured loan to SIG. Because SIG has failed to pay its loan back to Beck, Beck is a creditor of SIG. Beck also claims he has standing as a guarantor. But guarantors are "contingent creditors." *Mid-State Fertilizer v. Exchange National Bank*, 877 F.2d 1333, 1336 (7th Cir. 1989). "If the firm stiffs a creditor, that creditor can collect from the guarantor; the guarantor succeeds to the original creditor's claim against the firm." *Id.* Beck thus is properly characterized as a creditor for both of these claims.

"Creditors of a bankrupt corporation, however, generally do not have standing under RICO." *Manson v. Stacescu*, 11 F.3d 1127, 1130 (2nd Cir. 1993) (citing *Mid-State fertilizer*, 877 F.2d at 1336-37)). The creditor generally sustains injury only because he has a claim against the corporation. The creditor's injury is derivative of that of the corporation and is not caused proximately by the RICO violations. 11 F.3d at 1130; 877 F.2d at 1336-37.

Beck alleges that he was directly injured because he was fraudulently induced to extend the $150,000 loan by being "told both orally and in writing, through the mails, that he would continue to be the Chief Executive Officer of SIG after the [stock] offering and, as such, be in charge of the company." *Id.* at 7. Beck asserts that "[b]elieving these representations, Beck extended a $150,000 unsecured loan to SIG and invested an additional $75,000 (to purchase SIG stock)." But the only evidence Beck offers to support the broad assertion that he was told he would be CEO is a

statement in a Private Placement Memorandum offering for sale stock in SIG describing Beck as president and chief executive officer of SIG. Private Placement Memorandum (plaintiff's exhibit 11) at 42. It states that "Robert A. Beck has served as President and as a director of the issuer since September 1983[,] and that Mr. Beck is also currently Chief Executive Officer. . . . " *Id.* The memorandum nowhere tells or promises Beck that he will continue as CEO and SIG; it merely lists him currently as CEO. Beck offers no other written evidence that he was told that he would continue as CEO. Moreover, Beck offers no evidence at all – through affidavit, deposition transcript or otherwise by himself or anyone else – that he orally was told that he would continue as CEO. His bald assertion that he was told orally and in writing that he would continue as CEO is insufficient to withstand a standing challenge on summary judgment. *See Jacobs v. Florida Bar,* 50 F.3d 901 (11th Cir. 1995).

Besides the promise that he would be CEO, Beck's only other allegation that he was directly injured by extending the $150,000 loan was because "the defendants fraudulently hid from Beck some of the illegal manner in which they were already operating their Enterprise." *See* Beck's statement of material facts at 8. Beck further alleges that "[s]pecifically, the [Belleza Group] and other defendants fraudulently hid from Beck fraudulent representations they had made to indemnify contractors in order to enable these contractors in which they had an interest to get bonds." *Id.* Beck concludes that "[h]ad Beck known of these fraudulent promises to indemnify, he would not have extended the $150,000 loan nor invested the additional $75,000 in SIG. *Id.*

Beck supports these assertions by his own deposition testimony in which he states that, had he had information on the fraudulent representations the defendants made to indemnify contractors as officers of SIG, he would not have made or guaranteed loans. February 7, 1995 Deposition of Beck at 33. Beck states:

> I was hurt because information was withheld from me and had I had that information I could have prevented losses to myself and to others. I could have prevented the loss of signing the First Fidelity guarantee. . . . I could have prevented the loss that came about from the unsecured loan.

Id.

Although Beck alleges that defendants' acts directly injured him, Beck brings forward no facts to show a direct injury. Rather, Beck's above-quoted deposition testimony indicates that Beck's injuries were derivative to the injuries suffered by SIG. If SIG were restored, Beck would be restored because SIG then would be able to pay its debts to Beck – thereby satisfying its loan obligation to Beck – and pay its debts to others – thereby relieving Beck of his obligation to pay as guarantor SIG having defaulted on the First Fidelity loan. *See generally Manson v. Stacescu,* 11 F.3d 1127 (2nd Cir. 1993); *Mid-State Fertilizer v. Exchange National Bank,* 877 F.2d 1333, 1335-36 (7th Cir. 1989).

As such, Beck's injuries as an SIG creditor are no different than any other creditor of SIG. As a result, Beck's injuries were only indirectly caused by defendants' scheme against SIG. Indeed, any alleged racketeering acts were targeted at SIG's funds – not at Beck. For

these reasons, Beck does not have standing to sue under RICO on either his claim that he was fraudulently induced to loan $150,000 or his claim that he was fraudulently induced to guarantee a $7.5 million loan.

2. BECK'S STANDING AS A STOCKHOLDER.

Beck also alleges he has standing because he was fraudulently induced to hold his stock "until it was too late." *See* Beck's statement of material facts at 15. Beck claims he considered selling his stock in 1987. He claims, however, that "because of the fraudulent financial statements, the fraudulent inducement of the illegal manner in which the [defendants] were operating SIG and the fraudulent misrepresentation about the plans to terminate Beck, Beck did not sell the stock." *Id.* at 16. Beck thus alleges that information was fraudulently concealed from him, and that, for this reason, he failed to sell his SIG stock. The fact that he considered selling his stock even though he was being fraudulently induced to keep it points out how speculative Beck's claim is regarding his failure to sell his stock.

In any event, the Third Circuit recently concluded that "[f]ederal courts that have considered the question in shareholder suits *all* have held that shareholders lack standing to assert RICO claims where their injuries are not direct and distinct from any injury sustained by the corporation and shareholders generally." *In re Sunrise Litigation*, 916 F.2d 874, 881 (3rd Cir. 1990) (emphasis added) (cases cited at note 7); *see also Adams-Lundy v. Association of Professional Flight Attendants*, 844 F.2d 245, 250 (5th Cir. 1988); *Rand v. Anaconda-Ericsson, Inc.*, 794

F.2d 843, 849 (2d Cir. 1986). A RICO action to recover for injury to the corporation "is a corporate asset, and shareholders cannot bring it in their own names without impairing the rights of prior claimants in such assets." *Id.* As a result, shareholders cannot sue under RICO in their own name for diminution in the value of their stock; a decrease in stock value does not provide sufficient direct injury for the stockholder to sue in his own right. *Id.*

Beck alleges that he was fraudulently induced not to sell his stock by the defendants failing to disclose the alleged illegal activity that was occurring. But Beck fails to allege (nor does he bring forward testimony or affidavits supporting an assertion) that he was positioned differently than any other stockholder or that any other stockholder was not fraudulently induced to keep his stock. Beck fails to offer facts that any other SIG stockholder did not also sustain losses in the value of their shares. *See Manson v. Stacescu*, 11 F.3d 1127, 1131 (2nd Cir. 1993).

Even though other shareholders are alleged to have participated in the wrongdoing, those shareholders and Beck sustained the same injury with respect to the value of their SIG shares and all shareholders would be made whole by a shareholder derivation action. *See id.* The facts in this case show that Beck's injury as a stockholder was caused by the demise of SIG. Defendants' conduct was targeted at SIG, not at Beck and Beck's harm as a stockholder was only derivative in nature. Because Beck fails to bring forward facts of any direct injury to him as a stockholder, i.e., harm separate and distinct from the injury to SIG and other stockholders, Beck does not have

standing to sue under RICO in the capacity of a stockholder.

3. BECK'S STANDING AS A FIRED CEO.

Employees of companies looted by alleged RICO schemes frequently have been precluded from bringing a civil RICO action because their injuries were not proximately caused by the alleged misconduct. *See Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987); *O'Malley v. O'Neill*, 887 F.2d 1557, 1563 (11th Cir. 1989); *see also Cullom v. Hibernia National Bank*, 859 F.2d 1211, 1213 (5th Cir. 1988); *Willis v. Lipton*, 947 F.2d 998, 1000 (1st Cir. 1991). This is true when the employee was discharged in retaliation for reporting a RICO mail fraud scheme, *see Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), or for refusing to participate in the scheme. *O'Malley v. O'Neill*, 887 F.2d 1557, 1563 (11th Cir. 1989).

Beck alleges that the defendants fraudulently created causes for Beck's termination because of his threat to their continuing racketeering activity. *See* Plaintiff's statement of material facts in opposition to the New Jersey Group's motion for summary judgment 5-6. There is no basis on which to distinguish this case from *Morast* and *O'Malley;* the decision to fire Beck was tangentially related to any RICO violations that may have occurred.

4. CONCLUSION

Beck's case is similar to other cases in which an individual who is simultaneously an employee, stockholder, and creditor of a corporation attempts to recover

under RICO for injuries he incurred indirectly through a corporation. Though the 11th Circuit has not yet addressed one of these cases under a RICO standing analysis, *cf. Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), the 1st, 2nd, 3rd, 7th, and 9th Circuits all have concluded that such individuals lack standing to bring RICO claims. *See Bennett v. Centerpoint Bank*, 1991 U.S. App. LEXIS 32856 (1st Cir. 1991); *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2nd Cir. 1993); *In re Sunrise Litigation*, 916 F.2d 874, 881 (3rd Cir. 1990); *Mid-State Fertilizer v. Exchange National Bank*, 877 F.2d 1333, 1335 (7th [sic] 1989); *Hamid v. Waterhouse*, 1995 U.S. App. LEXIS 7693 (9th Cir. 1995). In *Mid-State Fertilizer*, Judge Easterbrook stated that

> [g]ood reasons account for the enduring distinction between direct and derivative injury. When the injury is derivative, recovery by the indirectly-injured person is a form of double counting. "Corporation" is but a collective noun for real people – investors, employees, suppliers with contract rights and others. A blow that costs "the firm" $100 injures one or more of those persons. If, however, we allow the corporation to litigate in its own name and collect the sum (as we do), we must exclude attempts by the participants in the venture to recover for their individual injuries. A fire that causes $100 worth of damage to "the corporation", and therefore reduces the value of the investors' stock by $100, does not cause a total injury of $200 – the net loss is $100, and everyone is made whole by an award of that sum to the firm.

Mid-State Fertilizer, 877 F.2d at 1335-36. The Supreme Court later stated that "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. at 1318. Judge Easterbrook also stated:

> [w]hy undertake such a heroic task when recovery by the firm handles everything automatically? – for investors, workers, lessors, and others share any recovery according to the same rules that govern all receipts. Recovery by the firm, followed by division according to entitlements, is especially important when the firm has landed in bankruptcy. Suits by shareholders, guarantors, and the like may well be efforts to divert the debtor's assets – to pay off one set of creditors [ ] while keeping the proceeds out of the hands of the firm's other creditors.

877 F.2d at 1336.

In this case, suits by the firm, i.e., SIG, against the defendants Beck names, i.e., SIG's officers and directors, have already been instituted. For example, SIG shareholders filed a derivative action in federal court in New Jersey for RICO violations. *See* Class Action and Derivative Complaint, *Insurance Consultants of America, Inc. v. Southeastern Insurance Group, Inc.*, Exhibit F, Defendants The Belleza Group's Statement of Material Facts (DE 138) ("The Class also seeks to recover derivatively with regard to ongoing corporate waste, mismanagement, fraud and related activities. The totality of actions by certain of defendants, comprising ongoing and continuous fraud

and other crimes, is a violation of federal and state Racketeer Influenced and Corrupt Organizations ("RICO") statutes, both as to shareholders and as to SIG."). Moreover, all three of SIG's wholly-owned subsidiaries were placed in receivership – two in Florida and one in New Jersey and both the Florida and New Jersey receivers filed actions against SIG's officers and directors, claiming looting and mismanagement. *See* Complaint for Damages for Mismanagement, Rescission of Voidable Transfer and Other Relief, *State of Florida, Department of Insurance as Receiver v. Leonard Belleza, et al.*, Exhibit N, Defendants The Belleza Group's Statement of Material Facts (DE 138); Complaint and Jury Demand, *Samuel F. Fortunato, in his official capacity as Rehabilitator v. Leonard Belleza*, Exhibit O, Defendants The Belleza Group's Statement of Material Facts (DE 138).

Because SIG can litigate (and already has litigated) against SIG's officers and directors in its own name, Beck's attempt to recover for his individual injuries cannot be permitted to go forward. Accordingly, the court holds that Beck lacks standing to sue under RICO because his injuries were not directly caused by the alleged racketeering acts and, it is

ORDERED AND ADJUDGED that defendants the Belleza Group's motion for summary judgment is **GRANTED.** Summary judgment having been granted on Beck's only counts the allege a federal question, and seeing that diversity is not present, the court declines to exercise supplemental jurisdiction over Beck's pendent state law claims pursuant to 28 U.S.C. § 1367(c)(3). The clerk is directed to close this case. All pending motions are denied as moot.

DONE AND ORDERED this 7 day of June, 1995.

/s/ Norman C. Roettger
NORMAN C. ROETTGER
CHIEF JUDGE

cc: counsel of record

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is

engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

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18 U.S.C. § 1964. Civil remedies

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in

which case the statute of limitations shall start to run on the date on which the conviction becomes final.

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